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AUTHOR Sanders, Wayne
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ABSTRACT

Free speech for the public employee is much more limited than free speech in the society at large. The courts have been unwilling to extend free speech protection carte blanche and have instead cautiously attempted to define what speech would be allowed or prohibited in public organizations. This approach is illustrated in four areas of court concern: (1) the controversy between internal versus external communication, (2) the establishment of criteria to distinguish protected from unprotected speech, (3) the scrutiny of organizational regulations, and (4) the case of organizational members refusing to participate in certain activities. Regardless of what free speech protections are available to an employee, they are only as good as the employee's ability to press a free speech claim. Two practical problems are involved in this: lack of due process hearings and the complexity of organizational punishments. It is clear, then, that while the First and Fourteenth Amendments of the Constitution may offer some protection for the outspoken employee, that employee must fight hard for the protection. If protecting whistle blowers is an important goal of society, then alternative legal strategies should be considered. One such strategy might be a specific contract with free speech provisions clearly stated. Another, and more promising strategy, is statutory protection. (FL)

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CONSTITUTIONAL PROTECTION FOR WHISTLE BLOWERS: HAS THE FIRST AMENDMENT CALLED IN SICK?

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by

Wayne Sanders

University of Pittsburgh

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When the First Amendment was put to use in 1789, its primary purpose was to prevent the abridgment of free speech by government.[1] Yet, as we move into the Eighties, organizational abuse[2] may pose a greater threat to traditional liberties than did the government of 1789.[3] As business professor and lawyer Kenneth Walters puts it:

> Many political and legal theorists now see [the lack of employee free speech rights] as a gap in our Constitutional structure. A growing literature warns against the dangers to a democracy of allowing large private bureaucracies to have extensive unchecked powers; public policy must ensure that private Leviathans respect and be held to traditional Constitutional standards of due process of law and civil rights.[4]

With this backdrop this essay will explore the uses and limitations of the First and Fourteenth Amendments in protecting free speech in modern organizations. More specifically, this paper will examine the private-public sector distinction, the criteria used to distinguish protected versus unprotected speech in organizations, and finally the special problems employees face when pressing free speech claims.

I. PUBLIC-PRIVATE SECTOR DISTINCTIONS

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . [emphasis added]." The key word here is Congress and with the addition of the Fourteenth Amendment the key word becomes government. The Amendments make no mention of private organizations.

In 1968, the Supreme Court held in Pickering v. Bd. of Education that public employees enjoy certain First and Fourteenth Amendment free speech rights.[5] However, no mention was made of private employees who historically fall under the ". . . common law doctrine that an employee who has no specific contractual protection (virtually all non-unionized employees) can be fired for any cause or reason, or no cause or reason."[6] Thus, a secretary for the Pennsylvania Department of Transportation has free speech rights but a secretary for U.S. Steel does not.

However, there is one exception. If the employee can show that the State was involved with the private corporation (i.e. state action), then Constitutional protections can be applied.[7] In 1975, the firing of an employee by Avco-Lycoming for publishing an article critical of company and union practices was held unconstitutional due to the symbiotic relationship between the Federal Government and Avco-Lycoming.[8] Yet, despite this success, all subsequent federal free speech/state action cases have proved futile.[9] Except in a few rare cases where the difficult burden of proving state action is met, private employees have no First Amendment free speech rights.

II. CRITERIA FOR PROTECTED VERSUS UNPROTECTED SPEECH

Free speech for the public employee is much more limited than free speech in society at large. Since the landmark 1968 Pickering decision, the courts, being unwilling to extend carte blanche free speech protection, have instead cautiously attempted to define what speech would be allowed and

what speech could be prohibited in public organizations. This wary approach is illustrated in four areas of court concern. The first area is the controversy between internal versus external communication; the second involves establishing criteria to distinguish protected from unprotected speech; the third is the scrutiny of organizational regulations; and fourth is the special case of organizational members refusing to participate in certain activities.

Internal v. External Communication

The 1968 Pickering decision, mentioned earlier, was concerned only with external communication. The case dealt with the right of a school teacher to send letters to a local newspaper criticizing a bond proposal and school officials. In the opinion of the Court, Justice Marshall made no mention of communication purely within the organization. This omission would lead to the rise and fall of a distinction between public communication (from one organizational member to the general public) and private communication (from one organizational member to another).

In 1972 the Seventh Circuit Court of Appeals found that a confidential memo which was leaked to the public could not be grounds for dismissal.[10] However, in 1975, the Third Circuit ruled that an associate professor's complaints to a college dean about the department chairman's behavior was essentially private communication and unprotected.[11] Two years later, the Fifth Circuit found that a teacher's statements to other employees about desegregation efforts were private and unprotected.[12] At the same time some circuits were ruling that both private and public communication was protected.

In 1979, the United States Supreme Court resolved the inconsistency between the circuits by holding in Givhan v. Western Line Consolidated School District that both private and public communication is protected.[13] The distinction between internal and external communication vanished. Although in this area protection was widened, protection is still limited.

Criteria for Protected Speech

Justice Marshall, in the 1968 Pickering decision, ruled that the statements of public employees are covered by the First Amendment unless they are, ". . . false statements knowingly or reclessly made."[14] However, Justice Marshall went on to hold that the First Amendment interests can be balanced against the employer's interest in efficiency.[15]

The balancing test forces the jurist to weigh two different interests.[16] But how are such different interests to be weighed against each other? Many courts assign heavy weight to the organizational interest in efficient operation but at least one court thinks that the organization must meet a heavy burden in order to swing the balance in favor of infringement of speech.[17] The inconsistency comes from the obvious problem in using a balancing test; that is, the difficulty of determining what effect a particular speech act might have had on a particular organization. This causal link between speech and efficiency is something that even organizational communicologists have failed to accomplish with anything resembling precision.

Although the Supreme Court has refined its ideas on what speech is covered by the First Amendment, it has never abandoned its sanction of the balancing test.[18] A prediction of how the courts will balance any particular speech act against the efficiency of a particular organization is speculation

at best. However, the courts have generally not protected speech within three broad catagories.

The first catagory is cooperation with superiors. The courts have not protected such behaviors as starting false rumors,[19] creating running disputes,[20] or showing an inability to handle criticism.[21] The second catagory is speech which threatens harmony among co-workers (i.e. conflict).[22] The third catagory is where the employee demonstrates a lack of personal loyalty to his/her superiors and/or organization.[23]

The balancing approach sacifices free speech for organizational efficiency. Since it forces the judge to make the dubious balance between the speech act and the effect the speech act had on a particular organization, the balancing test is difficult to use at best and arbitrary at worst.

Organizational Regulation

The courts have generally accepted rules and regulations which limit behavior in order to promote organizational efficiency.[24] However, at least the Second Circuit has required that regulations be based on, ". . . reasonable inferences drawn from concrete facts, but not on the mere apprehension or speculation that disturbances or interences with appropriate discipline will occur."[25]

The courts are wary of regulations that are vague or suffer from overbreadth. They require that the regulations be drawn as narrow as reasonsably possible.[26] The obvious intent here is to limit infringements of speech that are not absolutely necessary for the efficient operation of the organization.

One area where the courts seem willing to allow outright bans on speech is the release of confidential information. This may take the form of a deparmtnet rule,[27] or, as in the case of the CIA or other security agencies, a contract wherein a new employee, as a condition of employment agrees not to release confidential information during or even after employment.[28] However, if these materials have already been made public, the employee is free to comment on them.

Refusal to Participate-A Special Case

Since organizational members are usually hired to perform a certain job, the courts generally require that employees participate in organizational functions even if they wish to avoid doing so for symbolic reasons.[29] However, there are exceptions. As examples, the Second Circuit held that a teacher's refusal to say the pledge of allegiance was protected expression,[30] and the U.S. Supreme Court held that an employee could not be forced to pay any part of an agency shop fee that would be used to express points of view not directly related to representation and to which the employee was ideologically opposed.[31]

III. PROBLEMS WITH PRESSING CLAIMS

Regardless of what free speech protections are available to an employee, they are only as good as the employee's ability to press a free speech claim. Two practical problems are involved: lack of due process hearings and the complexity of organizational punishments.

Lack of Due Process Hearings

The first problem involved in pressing claims is the lack of due process hearings upon termination (or other punishiment). Unless provision is provided by statute or a tenure scheme, individual employees have no right to a due process proceeding which would reveal the cause(s) of the firing (or other punishment).

In 1972, the Supreme Court held that a non-tenured teacher had no right to a due process hearing unless there was a tenure-like expectancy of continued employment.[32] The Fourth Circuit went on to rule that an employer need not reveal the reason for not rehiring.[33] In 1976, the Tenth Circuit held that a "bad reaon" for not rehiring was unacceptable but that "no reason" was acceptable.[34] What this means is that the employee must go to court and prove that his/her dismissal (or other punishment) was the result of protected expression.[35]

Even if the employee can prove that protected speech was the cause of the dismissal (or other punishiment) the employer has an opportunity to show that other reasons would have resulted in the firing (or other punishment) anyway. This doctrine has not always been consistent. For example, the Tenth Circuit held that an employee could be fired for other reasons even if protected speech was one of them,[36] but in 1975, the Seventh Circuit ruled that other reasons did not justify dismissal if one of the reasons was protected speech.[37] The U.S. Supreme Court finally settled the dispute in 1977 by ruling that other reasons are acceptable for firing an employee even if one reason involves protected expression.[38]

Complex Organizational Punishments

The most obvious organizational punishment for objectionable speech

is dismissal. However, a clever organization can suppress speech with a plethora of punishments. Fortunately, the courts are willing to examine these non-traditional punishments.

The Tenth Circuit has found that the failure to hire an employee merely because of his/her views is unconstitutional.[39] Transfers to a less desirable job or even a job at the same pay but unfulfilling have also been viewed as unconstitutional punishment for protected speech.[40] The Fifth Circuit found that a newly adopted rule barring husbands and wives from working in the same department of a college was really punishment for protected speech,[41] and the Tenth Circuit allowed a woman to prove that a seldom used maternity regulation was really used in reprisal for protected speech.[42]

In any organization there are subtle punishments that no court can correct. These subtle punishments are beyond the scope of this paper, but should not be ignored. One must remember that the legal structure is only equipped to handle formal policies and decisions and not subtle personal relationships that can change a vibrant challenging job into a tedius one.

IV. CONCLUSIONS

Freedom of speech is one of our most cherished liberties. It has been praised not only as a basic protection for individuals but as a means to foster robust public debate on crucial issues. Yet, this liberty has only recently been applied to organizations.

Employees seeking the shelter of the First and Fourteenth Amendments run into three major problems. First, virtually all private sector

employees (the majority of our workforce), are not covered by the First and Fourteenth Amendments. Seocondly, employees seeking protection must make sure that their expression is free from conduct which might disqualify the expression from protection. Finally, employees must shoulder the burden of proving that they were punished for protected expression and even then, the employer can prove that other reasons would have resulted in the punishment anyway. In light of these problems, the First and Fourteenth Amendments do not appear to be the mighty bastions of liberty that they are for society at large. The First and Fourteenth Amendment may offer some protection for the outspoken employee but the employee must fight hard for that protection.

If protecting whistleblowers is an important goal of society, then alternate legal strategies should be considered. Two methods might provide greater protection .

The first is a specific contract with free speech provisions clearly stated. The obvious problem is that few organizations, especially in times of job shortages, would be willing to enter into such contracts with individual employees. However, employee groups such as unions, professional societies, and fraternal groups might force employers to enter into such contracts.

The seccnd, and more promising, approach is statutory protection. Statutes have the twin advantages of protecting private as well as public sector employees and secondly, specifically define the types of expression which are to be protected so vagueness is reduced.[43]

Whatever method is needed, some attempt ought to be made to reconcile the traditional values of society and the lack of those values in some organizations. For the benefit of the individual and society at large free speech should be guaranteed in every organization.

NOTES

[1] U.S.C.A. Const. Amend. 1; The First Amendment was expanded to the states via the Fourteenth Amendment in: Gitlow v. New York, 268 U.S. 652 (1925).

[2] For examples of organizational abuse see: Lawrence E. Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," Columbia Law Review, 67 (1967), 1104-35; Alan F. Westin, ed., Whistle Blowing: Loyalty and Dissent in the Corporation (New York: McGraw-Hill, 1981).

[3] The six largest U.S. corporations have a total population larger than all of the Thirteen Colonies combined in 1776. See: David W. Ewing, Freedom Inside the Organization: Bringing Civil Liberties to the Workplace (New York: McGraw-Hill, 1977), pp. 12-4.

[4] Kenneth Walters, "Employee Freedom of Speech," Industrial Relations, 15 (1976), 38.

[5] 391 U.S. 563 (1968).

[6] Walters, p. 38.

[7] There are four distinct tests which the courts use to determine if state action is present: close nexus test, Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974); symbiotic relationship test, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); sovereign function test, Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978); state enragement, Reitman v. Mulkey, 387 U.S. 369 (1967).

[8] Holodnak v. Avco Corp., Avco-Lycoming Division, 514 F.2d 285 (1975).

[9] See: Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (1976) a company providing tourist facilities in Yosemite National Park; Johnson v. Southwest Detroit Communicty Mental Health Services, 462 F. Supp. 106 (1978) a private non-profit corporation with pervasive state and federal regulation regarding services it provided, its structure, organization, staffing, and extensive government funding; Graseck v. Mauceri, 582 F.2d 203 (1978) a legal aid society with government funding, and housing in a government building; Heiskala v. Johnson Space Center Federal Credit Union, 474 F. Supp. 448 (1979) a credit union under the provisions of the 1934 Credit Union Act (12 U.S.C.A. 1752); Griffith v. Bell-Whitley Community Action Agency, 614 F.2d 1102 (1980) a community action agency with federal funding and under some federal regulations.

[10] See: Hostrop v. Board of Junior College District, 471 F.2d 488 (1972).

[11] See: Roseman v. Indiana Univ. of Pennsylvania, 520 F.2d 1364 (1975).

[12] See: Ayers v. Western Line Consolidated School District, 555 F.2d 1309 (1977).

[13] Givhan v. Western Line Consolidated School District, 99 S.Ct. 693 (1979).

[14] 391 U.S. 563 (1968); In Pickering Marshall adapted the standards found in the libel case of New York Times v. Sullivan, 376 U.S. 254 (1964), to statements made about the employee's organization.

[15] For examples of such a balancing approach see: Starsky v. Williams, 512 F.2d 109 (1972); Smith v. U.S., 502 F.2d 512 (1974); Clark v. Holms, 472 F.2d 928 (1972).

[16] The ad hoc balancing test has not been without its critics. For examples see: Justice Black, Justice Douglas, and Chief Justice Warren's dissents in Barenblatt v. United States, 360 U.S. 109 (1959), and Konigsberg v. State Bar of California II, 366 U.S. 36 (1961); Thomas Emerson, Toward a General Theory of the First Amendment (New York: Vantage, 1966).

[17] See: Illinois State Emp. Union v. Lewis, 473 F.2d 561 (1973).

[18] For examples see: Pickering v. Bd. of Education, 391 U.S. 563 (1968); Arnett v. Kennedy, 416 U.S. 134 (1974); Elrod v. Burns, 427 U.S. 347 (1976); Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 99 S.Ct. 693 (1979). However, some circuits have not used the balancing test in certain situations. For example see: Mabey v. Reagan, 537 F.2d 1036 (1976).

[19] For example see: Porter V. Mathews, 428 F.Supp. 711 (1976).

[20] For example see: Chitwood v. Feaster, 468 F.2d 359 (1972).

[21] For example see: Bradford v. Torrant County Junior College, 492 F.2d 133 (1974).

[22] For examples see: Phillips v. Adult Probation Department of San Francisco, 491 F.2d 951 (1974); Roseman v. Hassler, 520 F.2d 1364 (1974).

[23] For example see: Mannisto v. San Francisco, 541 F.2d 841 (1976); Newcomb v. Brennan, 558 F.2d 825 (1977).

[24] See: Arnett v. Kennedy, 416 U.S. 134 (1974).

[25] For example see: Connecticut State Federation of Teachers v. Bd. of Education, 538 F.2d 471 (1976).

[26] For examples see: Arnett v. Kennedy, 416 U.S. 134 (1974); Muller v. Conlisk, 429 F.2d 961 (1977); Milloux v. Kilsey, 448 F.2d 1242 (1971); Bence v. Brier, 501 F.2d 1185 (1974); Herzburn v. Milwaukee County, 504 F.2d 1189 (1974); Davis v. Williams, 598 F.2d 916 (1979).

[27] See: Franklin v. Atkins, 562 F.2d 1188 (1976).

[28] See: U.S. v. Marchetti, 466 F.2d 1362 (1975); U.S. v. Snepp, 595 F.2d 926 (1979).

[29] For example see: Graves v. Walton Bd of Education, 410 F.2d 1153 (1969); Shaw v. Bd. of Trustees, 549 F.2d 929 (1976).

[30] See: Russo v. Central School District No. 1, 469 F.2d 623 (1972).

[31] See: Abood v. Detroit Bd. of Education, 341 U.S. 209 (1977).

[32] See: Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

[33] See: Chitwood v. Feaster, 468 F.2d 359 (1973).

[34] See: Franklin v. Atkins, 562 F.2d 1188 (1976).

[35] See: Givhan v. Western Line Consolidated School District, 99 S.Ct. 693 (1979).

[36] See: Abeyta v. Town of Taos, 499 F.2d 323 (1974).

[37] See: Hostrop v. Bd. of Jr. College District No. 515, 523 F.2d 569 (1975).

[38] See: Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274 (1977).

[39] See: Franklin v. Atkins, 462 F.2d 1188 (1977).

[40] For examples see: Alicea Rosado v. Garcia, 562 F.2d 114 (1977); Bernasconi v. Temple Elementary School Dist. No. 3, 548 F.2d 857 (1977); Sexton v. Kennedy, 523 F.2d 1311 (1975); McGill v. Bd. of Education, 602 F.2d 774 (1979).

[41] See: Lewis v. Texas, 468 F.2d 553 (1972).

[42] See: Buckley v. Coyle Public School System, 476 F.2d 92 (1973).

[43] For a discussion of this approach see: Walters; Blades; Ewing.